U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 08 February 2007

CASE NO.: 2005-LHC-1349

OWCP NO.: 07-163749

IN THE MATTER OF:

C. R.[1]

Claimant

v.

NORTHROP GRUMMAN SHIP SYSTEMS, INC.

Employer

APPEARANCES:

TOMMY DULIN, ESQ.

For The Claimant

PAUL B. HOWELL, ESQ.

For The Employer

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), brought by Claimant against Northrop Grumman Ship Systems, Inc. (Employer).

[1] Pursuant to a policy decision of the U.S. Department of Labor, the Claimant's initials rather than full name are used to limit the impact of the Internet posting of agency adjudicatory decisions for benefit claim programs.

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on March 23, 2006, in Gulfport, Mississippi. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered 34 exhibits, Employer proffered 32 exhibits which were admitted into evidence along with one Joint Exhibit. This decision is based upon a full consideration of the entire record.[2]

Post-hearing briefs were received from the Claimant and the Employer. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. That the Claimant was injured on May 17, 2002.

2. That Claimant's injury occurred during the course and scope of his employment with Employer.

3. That there existed an employee-employer relationship at the time of the accident/injury.

4. That the Employer was notified of the accident/injury on May 17, 2002.

5. That Employer filed a Notice of Controversion on June 17, 2002.

6. That an informal conference before the District Director was held on May 20, 2004.

[2] References to the transcript and exhibits are as follows: Transcript: Tr.___; Claimant's Exhibits: CX-___; Employer's Exhibits: EX-___; and Joint Exhibit: JX-___.

7. That Claimant received temporary total disability benefits from May 18, 2002 through July 7, 2002 at a compensation rate of $428.00 for 7 weeks. Claimant also received temporary total disability benefits from July 15, 2002 through October 15, 2003 at a compensation rate of $428.00 for 65 weeks.

8. That Claimant's average weekly wage at the time of injury was $652.40.

9. That the undisputed portion of medical benefits for Claimant has been paid pursuant to Section 7 of the Act.

10. That Claimant reached maximum medical improvement on August 21, 2003.

II. ISSUES

The unresolved issues presented by the parties are:

1. Causation; fact of injury.

2. The nature and extent of Claimant's disability.

3. Entitlement to medical care and services, particularly services rendered by Drs. Kesler, Lyell, Martin, Benefield, and Apria Healthcare.

4. Whether Employer has paid and whether Claimant has received Employer's payment of scheduled benefits for five percent impairment to both of Claimant's hands. (Tr. 9).

5. Whether Employer is entitled to special fund relief under Section 8(f) of the Act.

6. Attorney's fees and interest.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant was deposed by the parties on November 14, 2005, and testified at formal hearing, at which time he was 63 years

old. (Tr. 26; EX-29, p. 1). He graduated from high school and attended Junior College for two years studying business administration, but did not graduate. (Tr. 26, 54). He has worked as a clerk, postal clerk assistant, foreman in a steel mill, radio dispatcher, cable puller, outside surveyor, and expeditor. (Tr. 27, 56). He has also worked in shipping, as a general laborer, college recruiter, and was self-employed owning a small pest control business. (EX-29, pp. 7, 9). Claimant has handled paperwork in several jobs, but stated he does not know how to use a computer. (Tr. 55-56).

Claimant was hired by Employer on August 4, 1975, and had been employed by Employer for approximately twenty-seven years prior to his accident on May 17, 2002. (Tr. 30, 56). At the time of his accident he held the position of "outside surveyor" with primary duties of shipping and storing material. Although he had held several positions with Employer over the years, he had been an outside surveyor for [about] seventeen to twenty years. (Tr. 58). His regular work schedule was 5 days, 40 hours per week at the time of his accident. (EX-29, pp. 12-13). Claimant stated he is presently incapable of returning to any job he has held in the past. (Tr. 27).

At the time of the accident, Claimant worked in an area where sheet metal was stored. Restroom facilities were constructed on metal platforms with wooden steps and wooden guard rails. As Claimant attempted to loosen a restroom door restraint attached to the adjacent guard rail, the guard rail gave way. (Tr. 28). Claimant stated that the next thing he knew, he was on the ground having fallen six or seven feet onto metal "lifting lugs." (Tr. 28-29). He stated he did not know if he lost consciousness or not. (Tr. 65). Claimant testified he could not move immediately after the fall. (Tr. 29). He had pain in his shoulders and head, and was bleeding from his head. (Tr. 29-30). He later discovered that his glasses and a tooth had broken. (Tr. 30). Claimant stated he also had a "blue spot" on his left side from the fall. (Tr. 68).

Claimant testified that prior to his May 2002 injury, he had many health problems, including insulin dependent diabetes, high blood pressure, and prostate cancer. (Tr. 58, 61, 62-63). Dr. Lyell performed an operation for prostate cancer on November 6, 2001. (Tr. 63). After the surgery Claimant wore pads for slight urine leakage, which is still present. (Tr. 64). For several years prior to his accident, Claimant had received treatment from Dr. Herminghuysen for diabetes. (Tr. 58). Claimant's family doctor, Dr. Striegel, treated him for

diabetes, high blood pressure, and other general ailments. (Tr. 59; EX-29, p. 22). Dr. Benefield provided treatment for diabetic retinopathy (a diseased condition of the retina) including six to eight eye surgeries beginning in 2001. (Tr. 59-60). Claimant developed gangrene of the scrotum in 1999 for which he underwent an operation by Dr. Lyell. Dr. McNair performed a routine colonoscopy to screen for polyps in 2000. (Tr. 62).

Claimant stated he did not remember the exact sequence of events about his medical care. (Tr. 37). The evening of the accident, Claimant was treated and released from Singing River Hospital. (Tr. 35). Claimant stated Dr. Striegel, his family doctor, told him he could not treat Claimant for the fall because he lacked workman's compensation approval. (Tr. 36). Dr. Striegel later diagnosed Claimant's hernia condition. (Tr. 40). Claimant testified he was treated by Dr. Roberts for a broken tooth sustained in the accident. (Tr. 71). Claimant also presented to Dr. McNair, who prescribed medication for the burning sensation in his shoulder and headaches, which "worked for a while." (Tr. 36).

Claimant stated he chose Dr. Longnecker as his treating physician. (Tr. 37). Dr. Longnecker examined Claimant and ordered an MRI which revealed a problem with three vertebrae in his neck. (Tr. 37). Following the MRI, Dr. Longnecker referred Claimant to Dr. Terry Smith, a neurosurgeon. (Tr. 73). Dr. Smith recommended against neck surgery at that time, but instead did epidural injections. (Tr. 73). Claimant testified he secured new glasses from Dr. Benefield to replace those broken in the accident. (Tr. 40).

Mary Slaught, a case worker, was assigned to Claimant's case by the workman's compensation carrier. She accompanied Claimant on visits to Drs. Kesler, Lyell, and Aldridge. (Tr. 38). Dr. Kesler is a pain management specialist. (EX-29, p. 27). He also diagnosed Claimant with a sleeping disorder and carpal tunnel syndrome, and prescribed a "stimulator" machine for nerves in his neck. As requested by Ms. Slaught, Claimant also presented to Dr. Aldridge, another pain management specialist, who did Botox injections. (Tr. 38; EX-29, p. 28). After treatment by Dr. Aldridge failed to resolve Claimant's pain, he returned to Dr. Kesler who did additional tests. (EX-29, p. 29). Dr. Longnecker performed surgery on both of Claimant's hands for carpal tunnel syndrome. (EX-29, pp. 30-97). Claimant obtained services that were not paid by workman's compensation through his private health insurance. (Tr. 50-51).

Claimant testified he was treated by Dr. Lyell for urinary problems. (Tr. 38). He had trouble voiding after the fall, a problem he had not had prior to the fall. (Tr. 103). Claimant presented several times to Ocean Springs Hospital to have urine drained with a catheter. Thereafter, Dr. Lyell performed a procedure that seems to have worked. Claimant was given a hand catheter after the procedure, but has not had to use it. (Tr. 39). Claimant stated that Dr. Lyell told him that the procedure could have been needed as a result of the fall, although Dr. Lyell also noted the cause as bladder dysfunction due to diabetes. (Tr. 68-69). The medical history recorded by Dr. Lyell states Claimant had no "parineal injuries that he is aware of." (Tr. 103-104). However, Claimant testified that he did not know what a "perineal injury" was. (Tr. 104).

Claimant was treated by Dr. Kesler for headaches, and a sleeping disorder. (Tr. 40, 73). Dr. Kesler sent Claimant to a clinic where he was evaluated over night. (Tr. 40). He was given a small oxygen machine to aid sleep, which he uses frequently. (Tr. 41). Claimant testified, the machine helps his sleep but does not stop the pain which interrupts his sleep. (Tr. 34; EX-29, p. 34) He stated he usually does not sleep with his wife because he is "up and down" all night. As a result of sleepless nights, he also sleeps during the day. (Tr. 34-35).

Dr. Kesler ordered a functional capacity evaluation of Claimant, after which he released Claimant to work with restrictions. (Tr. 45, 76). At that time, Dr. Kesler was treating Claimant's neck and Dr. Longnecker was treating his hands. (Tr. 76).

Claimant was released by Dr. Longnecker on August 21, 2003, to return to work with restrictions. (Tr. 41-42, 76). Claimant testified that he wanted to return to work in August 2003. (Tr. 77). Claimant stated that a notation by Dr. Smith on October 8, 2002, stating that he did not like his job and did not intent to return, was not truthful. (Tr. 77).

After Claimant was released to return to work by Drs. Kesler and Longnecker, he was instructed by Employer to return to work on October 16, 2003. (Tr. 81). However, prior to October 16, 2003, Claimant's wife rushed him to the hospital because of severe vomiting, and was told that his gall bladder was inflamed. He presented to Dr. Frank Martin who performed one operation on October 13, 2003, in which Claimant's gall bladder and hernia were addressed. (Tr. 40, 81). Claimant did

not report to Employer on October 16, 2003, as instructed in the letter, because of the operation. (Tr. 81). Claimant testified he had not had gall bladder problems prior to the injury. (Tr. 83). Dr. Martin released Claimant to return to work on January 9, 2004. (Tr. 81-82).

Claimant returned to work for Employer on January 14, 2004. (Tr. 84). He had received a letter stating he was to have a modified job, but was told by his supervisor that his former position of driving a forklift/tow motor was the only job available. (Tr. 42). This job involved lifting more than ten to fifteen pounds. (TR. 87).

Claimant testified that he was required to drive the forklift over a bumpy unpaved area that caused bouncing. He had to look up to load items onto pallet racks, and was required to rotate his neck when backing up. After driving the forklift for two days, Claimant experienced severe neck pain, and as a result was off of work for two days. Claimant returned to work for four days, and then reported again to Dr. Longnecker with complaints of neck and shoulder pain. (Tr. 43). Dr. Longnecker further restricted Claimant to no work on forklifts/tow motors. (Tr. 44). Employer could not accommodate Claimant's further work restrictions, and Claimant has not worked for Employer since those restrictions were prescribed. (Tr. 44, 90). Claimant was dismissed by Employer on January 27, 2004. (Tr. 90).

Claimant stated he applied for jobs in May through June 2004. He applied at a construction company, a "parts place," and jobs listed in the labor market survey. (Tr. 46-47; EX-27). Claimant testified he had not applied for any jobs prior to May 21, 2004, when he received the "job search" forms and was instructed to apply by his attorney. (Tr. 79-80). He stated that Employer has a policy of firing someone who takes a job with another company while still employed with it. (Tr. 104).

Claimant further stated he had not applied for light duty jobs in the labor market survey that paid wages which he considered insufficient to pay his bills. (Tr. 93-94). He applied for labor jobs and as a painter, which he acknowledged included duties which he was not capable of performing. (Tr. 96-97). At deposition, Claimant testified he applied for some jobs that were outside of his restrictions because he thought they may "have something easy for me, like go get materials or

something like that." (EX-29, p. 47). He stated he believed that he could have handled some of the jobs doing very light work like driving a light truck, but was incapable of handling machinery required for some of the jobs. (Tr. 47).

At the time he applied, he had high blood sugar, swollen feet, was on medication, and taking Botox injections. Claimant stated he was told by potential employers that he could not be hired because they could tell that "something was wrong" with him. (Tr. 47). Claimant testified that he is less able to work presently than he was in 2004 when he sought employment. (Tr. 48). He has not applied for work since 2004. (Tr. 95).

Claimant testified he received a letter from the Department of Labor stating that he should receive approximately $10,400.00 from Employer. Claimant has not received that payment. (Tr. 48-49).

Claimant testified his health has been declining since the accident. (Tr. 31). He presently experiences constant pain in his shoulders and neck, and blurred vision. He sees a "floater coming by" and fogginess with his left eye, which began about a week after the May 2002 injury. (Tr. 31-32). Since the injury, Claimant also experiences severe headaches, and has a severe burning sensation if he reaches upward. He stopped taking prescribed pain medication for the headaches because it made him too "high." (Tr. 33).

His eye problems do not preclude driving. However, Claimant testified that he tests his sugar level every morning. If his sugar is elevated above 250, he does not drive that day. (Tr. 105). He does not take long trips because he cannot move his head around to see. (EX-29, p. 58). No doctor has told him not to drive. (EX-29, p. 58).

Claimant testified that he presently maintains a sedentary lifestyle, typically staying home unless he has a doctor's appointment. (Tr. 52). He had eight or ten doctor's appointments this month. (Tr. 53). His hobby is bass fishing, which he has not done for quite some time because shoulder and neck problems render him incapable of casting. (Tr. 101-102). He stated he can no longer perform routine tasks such as grass cutting, washing his vehicle, cutting fire wood, or digging in his garden, without severe pain and sleeplessness. Claimant hires other people to perform these functions. He also cannot paint due to his shoulder and neck problems. (Tr. 48).

Medical Evidence

Medical Evidence prior to Claimant's work-related injury

Claimant was treated on numerous occasions for prostate problems. (EX-32, pp. 5-12). He had prostate surgery on November 6, 2001 at Ocean Springs Hospital. (EX-32, p. 13). Claimant again had surgery in April 1999 at Ocean Springs Hospital for debridement of his scrotum for gangrene condition. Discharge diagnosis described: 1. Fournier's gangrene, 2. hypertension, 3. insulin-dependent diabetes, 4. anemia, 5. gastritis. (EX-32, pp. 1-2).

Claimant's initial treatment for the work-related injury

On May 17, 2002, Claimant presented to Singing River Hospital for treatment after the compensable injury. Dr. Michael Seymour noted Claimant was a "well-developed obese male that does not appear in acute distress." Diagnoses were noted as: (1) closed head injury with loss of consciousness status post a fall; (2) left periorbital (eye area) contusion; (3) multiple head contusions; and (4) two centimeter scalp laceration. Claimant's abdomen was noted as "obese, otherwise benign. There is no tenderness." Hospital Course includes "urinalysis was dipped . . . and is trace positive for blood." (CX-17, pp. 1-3). A CT scan of the cervical spine was normal. (CX-17, p. 8).

It was later noted by Dr. Longnecker that Claimant was seen the evening of the accident by Dr. Lyle who did a catheterization. (CX-19, p. 36).

Claimant presented Dr. William L. Strigel, his family physician, on May 23, 2002. Dr. Strigel assigned work restrictions of lifting not exceed 5 pounds, avoidance of any activity that would bump or vibrate. (CX-14, p. 1).

Medical Evidence related to Claimant's Urologic problems

On May 18, 2002, Claimant presented to Ocean Springs Hospital. Dr. Douglas McDowell, the attending physician noted Claimant "was seen at Singing River Hospital . . . there they put a Foley in and now he is having pain and burning on urination. He has not had a problem with urinary retention prior to this though." (CX-28, pp. 2, 4, 6).

Claimant's personnel file contained a record of his presentation to Employer's representative Sybil Bouman, RN, on May 20, 2002. Notations by Ms. Bouman include "laceration to left forehead, abrasion to left elbow, large bruised area just below left rib cage, abrasions and bruises to left lower leg, swelling noted of left eye." "Patient was seen in Singing River Hospital emergency room on Friday night. Had to be catherized for urine [illegible]." (CX-25, p. 65).

On May 21, 2002, Claimant was treated at Ocean Springs Hospital by Dr. Mark Mauldin for urinary retention. (CX-28, p. 9).

On May 29, 2002, Claimant presented to Dr. Mark S. Lyell for uninary retention. Dr. Lyell noted Claimant "comes in today with problem voiding. He fell on the 17th of May and has had problem with urinary retention since then. He had a radical prostatectomy . . . was still having a bit of leakage from that prior to this." Dr. Lyell also noted "I told the patient that it could be from his fall," and that "he has not had any perineal injuries that he is aware of." Claimant's abdomen was noted as "soft, non-tender." (CX-18, pp. 5-6).

On May 30, 2002, Dr. Lyell performed a "resection of the bladder neck contracture," operation. (CX-18, p. 2). Claimant was discharged to go home following the operation with instructions to return the following day for catheter removal. (CX-18, p. 3).

On May 31, 2002, Claimant was treated at Ocean Springs Hospital by Dr. Jeffrey Bass for urinary retention. (CX-28, p. 10).

On June 27, 2002, Claimant presented to Dr. Lyell for follow-up post surgery. Dr. Lyell noted Claimant "probably had some problems with bladder dysfunction due to his diabetes which accounted for part of his problem voiding." (CX-18, p. 1).

Medical Evidence related to Claimant's broken tooth

On June 4, 2002, Dr. Claude Henry Roberts "surgically removed tooth # 21 that had been broken due to a reported injury at work," and "constructed a lower removable partial plate to replace the extracted tooth." (CX-12, p. 1).

Medical Evidence related to treatment of Claimant's neck, shoulders, hands, and sleep apnea

Treatment by Dr. Morton F. Longnecker

Dr. Morton F. Longnecker, a board-certified orthopedic surgeon, was deposed by the parties on March 7, 2006. (EX-31, pp. 1, 24). Dr. Longnecker first saw Claimant on July 23, 2002, for evaluation of problems with his neck and shoulder. (EX-31, p. 5).

Claimant related a history of his fall at work on May 17, 2002. (EX-31, p. 5). Following the accident, Claimant had a burning sensation in his neck and shoulders, blurred vision, and had difficulty urinating. Claimant was catherized the evening of the fall two or three times. (EX-31, p. 5). Claimant had a history of prostate cancer and diabetes, but had not experienced trouble with his neck and shoulder prior to the accident. (EX-31, p. 6). Claimant also complained that his wrists were bothering him. (EX-31, p. 7).

Dr. Longnecker testified that x-rays revealed narrowing of the acromioclavicular joint, which is the joint joining the collarbone and shoulder. The changes could be post-traumatic or arthritic in nature. (EX-31, p. 7). Dr. Longnecker ordered an MRI, which was performed on July 31, 2002. (EX-31, pp. 7-8). Claimant presented for follow-up on August 1, 2002. (CX-19, p. 33). The MRI revealed a fairly large central disc rupture at C6-7, and a mild bulge at C5-6. (EX-31, pp. 7-8). Dr. Longnecker referred Claimant to Dr. Terry Smith, a neurosurgeon, for further evaluation, and prescribed physical therapy and anti-inflammatory medication. (EX-31, p. 8).

On October 14, 2002, Dr. Longnecker noted that Dr. Smith was considering epidural steroid injections instead of surgery because Claimant had improved with therapy. (CX-19, p. 30; EX-31, p. 9). Claimant later had epidural injections, nerve blocks, and trigger point injections by Dr. Aldridge. (EX-31, pp. 9-10).

Dr. Longnecker also noted Claimant had filed for social security disability benefits. He opined "I am thinking he (Claimant) is probably going to consider retiring, which probably is appropriate with the medical problems as well as the neck problems he is having." (CX-19, p. 30)

On December 10, 2002, Claimant presented to Dr. Longnecker following his third epidural steriod injection. Dr. Longnecker noted Claimant had headaches, short-term memory loss, and a flutter sensation in his eye. He recommended an MRI and follow-up with an ophthalmologist. (CX-19, p. 29).

An EMG confirmed "fairly severe carpal tunnel involvement" of Claimant's hands which Dr. Longnecker opined was "directly and causally related to the injuries" Claimant received on May 17, 2002. (EX-17, p. 10). Dr. Longnecker noted on March 6, 2003, that he further discussed carpal tunnel release surgery with Claimant, and recommended he wait until after the treatment by Dr. Kesler. (CX-19, p. 23). Claimant again presented on March 11, 2003. Dr. Kesler had released him to return to work, and he wanted to go forward with carpal tunnel surgery. Dr. Longnecker noted "As far as a return to work, at this point, I do not think it is in his best interest. More than likely with the multiple problems he has, he should consider retirement. I have also advised him that I think he should apply for his social security benefits." (CX-19, p. 22).

Dr. Terry Smith, a neurologist, was consulted on March 25, 2003, regarding Claimant's carpal tunnel condition. He stated "I do not disagree with carpal tunnel release, although I do not think it came on with this fall, and rather is a result of a repetitive injury." (EX-23, p. 5).

Dr. Longnecker performed surgery for carpal tunnel on Claimant's left wrist on April 9, 2003, and on his right wrist on May 22, 2003. (EX-31, pp. 10-11). Dr. Longnecker also stated he referred Claimant to Dr. Roman Kesler, a neurologist, because of his continued complaints. (EX-31, p. 11).

Claimant presented to Dr. Longnecker for follow-up on July 21, 2003. Dr. Longnecker recommended continued therapy for Claimant's hands and noted with regard to the FCE performed on July 14, 2003, "indicates that he can do light work only, which I would agree with. He cannot turn his head side to side, so it pretty much rules out driving a tow motor. I question whether he is going to get back to work in any gainful capacity." (CX-19, p. 9; EX-31, p. 12).

Dr. Kesler assigned July 21, 2003 as the MMI date for Claimant's neck, and Dr. Longnecker assigned August 21, 2003, as the date of maximum medical improvement for Claimant's hands with five percent loss to each hand. (CX-19, p. 8; EX-31, pp. 13-15). He released Claimant to return to work with limitations

of no repetitive use of the hands and no lifting over ten pounds, in addition to the restrictions listed in the functional capacity evaluation dated July 14, 2003. (CX-19, p. 8; EX-31, p. 14; EX-25, p. 21). Dr. Longnecker testified that he advised Claimant on December 23, 2003, that he could return to work at Employer if they had work within his restrictions. (EX-31, p. 15).

Dr. Longnecker testified that Claimant returned to work driving a tow motor. (EX-31, pp. 15-16). On January 26, 2004, Claimant presented with pain caused by bouncing of the fork lift/tow motor. (CX-19, pp. 3-4). The bouncing was hurting his neck to the point that he could not do the job. As a result, Dr. Longnecker stated he imposed a work restriction against operation of a fork lift/tow motor. On March 11, 2004, Dr. Longnecker reiterated the restriction noting it was necessary because fork lift driving required repeated turning of the head and bouncing up and down, which caused Claimant great discomfort. (CX-19, p. 2).

Since Claimant was unable to return to work after a valid attempt, Dr. Longnecker advised him that he should seek Social Security disability benefits. (EX-31, pp. 17-18). Dr. Longnecker felt that Claimant's condition would gradually worsen due to his other medical problems unrelated to the injury. (EX-31, p. 18).

Claimant again presented to Dr. Longnecker on August 30, 2004. Dr. Longnecker noted "he has constant pain with increased levels of activity . . . he still cannot grip well with his hand, and his neck hurts him constantly. At this point, I have nothing further to offer him . . . It is my opinion he is disabled for gainful employment and will remain so indefinitely." (CX-19, p. 1).

He noted Claimant continues to have considerable neck pain, problems with his hands, and is losing vision in his left eye. (EX-31, p. 16). Dr. Longnecker testified, that to his knowledge, Claimant's eye problem was not related to his injury on May 17, 2002. (EX-31, p. 17). Dr. Longnecker agreed that Claimant's problems with prostate cancer, gangrene of the testes, high blood pressure, and diabetes were unrelated to his injury. (EX-31, p. 17). He further testified that Claimant's underlying problems of prostate cancer, gangrene of the testes, high blood pressure, and diabetes did combine with his work-related injury to render Claimant materially and substantially more disabled than he would have been due to the injury alone.

(EX-31, pp. 18-19). Dr. Longnecker opined that the pain Claimant suffered as a result of the injury probably worsened his hypertension, although he could not document that. (EX-31, p. 21).

Dr. Longnecker stated: "Had all these problems not been magnified and aggravated by his [Claimant's] underlying medical condition, he probably could have gone back to some kind of gainful activity. But the sum total of which, in my opinion, rendered him incapacitated to work, which I think he remains that way at this point." (EX-31, pp. 19-20). Dr. Longnecker agreed that absent Claimant's vision problem, he probably could have done light work. (EX-31, pp. 20-21).

Treatment by Dr. Terry Smith and Dr. Edward F. Aldridge

Claimant presented to Dr. Terry Smith, neurosurgeon on August 17, 2002. Dr. Smith noted in Claimant's history that "his neck pain will awaken him at night." Dr. Smith also noted that Claimant told him multiple times about "what a terrible fall he had." Dr. Smith advised Claimant to think about the future and getting better. (EX-23, p. 1). Dr. Smith noted on September 6, 2002, that Claimant's neck had a "potentially surgical lesion." He recommended continued physical therapy since it was still helping. As an addendum, Dr. Smith noted "he is not as focused on how bad a fall he had this time, and I think this will help him improve more quickly." (EX-23, p. 3).

On October 8, 2002, in a communication to Dr. Longnecker, Dr. Smith stated Claimant had reached a plateau with physical therapy and they would try steroid injections. Dr. Smith further noted "he (Claimant) has made it known to the physical therapist and to me, that he does not like his job and does not plan to go back to it. I asked him if he would be willing to go back to work with some restrictions, and he said that he has worked at that job for 27 years, and he has seen too many arguments, and too many people asked to work beyond their restrictions." (EX-23, p. 4).

Dr. Smith referred Claimant to Dr. Edward F. Aldridge, Anestesiologist-Pain Management, for cervical epidural steriod injections. Injections were performed by Dr. Aldridge on October 18, 2002, October 29, 2002, November 15, 2002. (CX-13, pp. 1-3). Dr. Aldridge noted on November 25, 2002, that Claimant's radicular symptoms and some neck pain resolved with the injections, but Claimant continued to complain of neck pain. (EX-24, p. 4). Thereafter, Dr. Aldridge performed nerve blocks

and trigger point injections on March 17, 2003, March 24, 2003, and May 16, 2003. (CX-13, pp. 8, 9, 12). The final documented injections were performed on May 27, 2004. (CX-13, p. 14; CX-33, pp. 12-13).

On April 18, 2003, Dr. Aldridge noted his diagnosis of degenerative disc disease of the cervical spine with mild spinal stenosis. (CX-13, p. 10). On May 16, 2003, Dr. Aldridge noted that Claimant had experienced only short-term pain relief after injections, and had severe neck and shoulder pain on that date. (CX-13, p. 12).

In a response to a questionnaire from FARA Healthcare Management dated March 25, 2003, Dr. Smith responded that Claimant could return to work with restrictions. (EX-23, pp. 6-7).

Treatment by Dr. Roman Kesler, (Bienville Coast Neurology)

Claimant was referred to Dr. Roman Kesler by Dr. Longnecker. (CX-16, p. 9). Dr. Kesler examined Claimant on December 23, 2002. Claimant's symptoms were noted including continued neck and back pain which increases with physical activity and several other activities. Dr. Kesler further noted that Claimant had difficulty sleeping because of awakening with pain, but also had symptoms of sleep apnea which were daytime somnolence and naps, trouble falling back to sleep when he awakens at night, and snoring. (CX-16, p. 3).

Dr. Kesler ordered a nerve conduction study of bilateral upper extremities which indicated "a mild to moderate motor-sensory mixed axonal-demyelinating peripheral polyneuropathy, and carpal tunnel syndrome. (CX-16, p. 9). Suspecting sleep apnea, Dr. Kesler noted "we will also bring him back for formal polysomnography due to the strong possibility that he suffers from sleep apnea. Though it is not directly related, it may worsen chronic pain states." (CX-16, p. 2).

The sleep test was conducted on December 30, 2002, and revealed obstructive events during all stages of sleep. (CX-16, pp. 16-17). Dr. Kesler described Claimant's condition as "significant sleep apnea." (CX-16, p. 20).

Dr. Kesler performed Trigger Point Injections for treatment of Claimant's neck and shoulders on December 27, 2002, January 7, 2003, and January 30, 2003. (CX-16, pp. 8, 15, 19).

On January 23, 2003, Dr. Kesler noted that Claimant's neck and shoulder were 40% better. He ordered treatment with a muscle stimulator which Claimant received in January and February 2003. (CX-16, pp. 20, 24).

Claimant presented to Dr. Kesler on February 13, 2003. Dr. Kesler noted that Claimant "continues to have problem w/ any type of jarring motions. For example, when he drives his truck, that typically hurts his posterior head region, neck and trapezius area." Dr. Kesler additionally noted that the CPAP (continuous positive airway pressure, treatment for sleep apnea) is helping, and opined that Claimant did not qualify for disability. He recommended injections of Botox for muscle spasms and pain. (CX-16, p. 26).

Dr. Kesler performed a series of Botox injections in February and March 2003. (CX-16, pp. 27-29). At a follow-up visit on March 10, 2003, Dr. Kesler prescribed a soft collar, and a nerve block. He opined that if the nerve block was ineffective, he would proceed with a functional capacity evaluation. He released Claimant to light duty work with restrictions of no climbing ladders, no work at heights over five feet, no prolonged extension or head and neck rotation and no lifting over ten to fifteen pounds. (CX-16, pp. 28-29).

Claimant again presented to Dr. Kesler on July 21, 2003. Dr. Kesler noted Claimant had completed an FCE and "indicated that he would like to go back to work as much as he can if at all possible." Dr. Kesler maintained a diagnosis of: (1) cervicalgia with myofascial spasm and pain; (2) degenerative disc disease and cervical spinal stenosis as per MRI. (CX-16, p. 34).

Dr. Kesler performed a Botox injection on July 29, 2003, and noted on August 21, 2003, that Claimant still had pain. On that occasion, Claimant requested a trigger point injection and nerve block that had helped in the past, but did not have a driver with him. (CX-16, pp. 38, 40).

Medical Evidence related to Claimant's Hernia & Gall Bladder

Claimant was admitted to Singing River Hospital on October 14, 2003, for gall bladder and hernia surgery. On October 15, 2003, Dr. Frank Martin performed surgery. He noted that Claimant's gall bladder was acutely inflamed, and had areas of gangrene. His postoperative diagnosis described: (1) acute gangrenous cholecystitis with choelithiasis; (2) umbilical

hernia; (3) insulin dependent diabetes mellitus. (EX-18, p. 4; CX-17, p. 17; CX-15, pp. 1-2).

Dr. Martin released claimant to return to work on January 9, 2004 with restrictions, "to be modified by Walker & Associates." (CX-15, p. 5).

Physical Therapy

At Claimant's initial physical therapy evaluation on August 12, 2002, the physical therapist noted Claimant had "moderate difficulty with sleep (pain every other night) but mostly keeps patient from falling asleep." (EX-22, p. 7).

The Vocational Evidence

Functional Capacity Evaluation (FCE)

A functional capacity evaluation was performed by Physical Therapy Center of Ocean Springs on July 14, 2003. The report indicates that Claimant exerted maximum effort. (EX-25, p. 21).

The report indicated the maximum capability level at which Claimant could perform was light work, defined as lifting, carrying, pushing, pulling up to twenty pounds occasionally, frequently up to ten pounds, or a negligible amount constantly. Capabilities were assessed to include walking or standing frequently even though weight is negligible, and pushing or pulling of arm and/or leg controls. Maximum lifting and carrying limit was twenty-five pounds, except for shoulder height and overhead lifting which was limited to twenty pounds. (EX-25, p. 21).

Vocational Rehabilitation Reports by Mr. Joe H. Walker

Joe Walker of Walker & Associates was retained by the Department of Labor to monitor Claimant's return to work at Employer. (Tr. 85). He interviewed Claimant on the day he returned to work after having been off for two days due to pain. (Tr. 85-86). The Department of Labor also supplied a vocational expert, Ronnie Smith to find suitable employment for Claimant. (Tr. 97). Claimant stated that at the time Mr. Smith was assigned to his case, he was heavily medicated and unable to search for work. (Tr. 97). As a result, Mr. Smith closed his file. (Tr. 97).

Mr. Walker was authorized to monitor Claimant's return to work at Employer. (EX-26, pp. 2, 11). In his report dated October 31, 2003, Mr. Walker listed restrictions assigned by Dr. Kesler as "no repetitive use (of hands), and no lifting over ten pounds" in addition to restrictions specifically related in the FCE of July 2003. (EX-26, pp. 6, 8).

On January 15, 2004, Mr. Walker noted that Claimant indicated he had returned "at the same job" as he performed prior to the compensable injury. (EX-26, p. 16). Mr. Walker also noted observing that the area in which Claimant worked was a large open air facility in which Claimant had worked the previous night. (EX-26, pp. 16, 18). Some of the areas are well lit, and fringe areas are not. (EX-26, p. 18). He further observed that the roadways traveled by the forklifts contained irregular surface areas. (EX-26, p. 19).

In his report dated January 28, 2004, Mr. Walker stated that Claimant related in a telephone conversation on January 15, 2004, that upon his return to work, he was performing work activity that was outside of his work restrictions. (EX-26, pp. 13, 17-18, 22). The report did not outline proposed suitable alternative employment.

Vocational Report by Mr. Tommy Sanders

At the request of F. A. Richard and Associates, Employer's representative, Mr. Sanders produced a preliminary vocational assessment/labor market survey dated June 4, 2004, and follow-up on March 1, 2006. (EX-27, pp. 7, 15). He interviewed Claimant whom he noted had undergone ESI (epidural steroid injection) on the day of interview. (EX-27, p. 7, 9). Claimant questioned his ability to sustain a regular work schedule. (EX-27, p. 7). Claimant stated he has "both good and bad days," and felt he could work at his own pace but not on a sustained 8-hour schedule. (EX-27, p. 10). It was also noted that Claimant utilizes a soft cervical collar. (EX-27, p. 7).

Work limitations utilized were per Drs. Longnecker and Kesler, and as listed in the FCE of July 2003. The FCE limitations were noted as "associated with performing sustained cervical extension tasks" such as overhead lifting, overhead work, and crawling. Restrictions included occasional bending, squatting, reaching above shoulder, and climbing. Lifting was limited to 20-25 pounds occasionally, and 10 pounds frequently. Dr. Longnecker assigned limitations of no repetitive work (with

hands) and no lifting over 10 pounds, and prohibited operation of a fork lift. (EX-27, pp. 9-10).

The following jobs were available on or about January 27, 2004. (EX-27, p. 10).

The position of full-time **security guard** at Swetman Security with a wage rate of $7.00 per hour was identified. (EX-27, p. 10).

At that time, Country Inn was hiring one full-time **desk clerk** at a wage of $6.50 per hour, and two full-time **security guards**. (EX-27, p. 10).

Three positions were identified as available in June 2004. (EX-27, p. 6). The position of **security guard** with Boomtown Casino was available in June 2004. The position was a full-time position with a wage rate of $7.50 per hour. Physical requirements were lifting of five to ten pounds, and frequent to constant standing and walking. (EX-27, p. 6).

The second position identified was as a full-time **security guard** with Swetman Security. The wage rate was $7.00 per hour and physical requirements are frequent to constant standing and walking, frequent handling and lifting of five to ten pounds. Duties may also include gate guard duties, monitoring, and logging information. (EX-27, p. 6). This position was also available on or about January 27, 2004. (EX-27, p. 10).

The third position was full-time **security clerk** with Grand Casino. The wage rate was $8.00 per hour. Some duties listed are file maintenance and disbursing items from lost and found. Other duties and physical requirements were not listed. (EX-27, p. 6).

A follow-up labor market survey on March 1, 2006, listed the following jobs as available at that time. (EX-27, p. 15).

A full-time position of **front desk clerk** with Wingate Hotel was identified. The wage rate was $7.50 per hour, and duties included keeping lobby clean, checking guests in and out, answering the telephone and folding towels on night shift. Physical requirements were lifting of two to five pounds, alternate sitting, standing and walking with frequent use of the upper extremities. (EX-27, pp. 15-16).

Swetman Security was hiring for several positions as full-time **security guard** at a wage rate starting at $8.00 per hour. Duties varied depending upon the work site, and included foot patrol, gate guard activities, and completing reports. Physical requirements were varying degrees of sitting, standing, and walking, and occasional lifting of ten pounds. (EX-27, p. 16).

A full-time position as **front desk clerk trainee** with Howard Johnson's was available. Duties included answering the telephone, booking rooms, checking guests in and out, and cleaning the lobby. Physical requirements included lifting two to five pounds, frequent sitting, standing and walking, infrequent pushing and pulling of two to five pounds, and twisting and bending when utilizing a mop or broom. (EX-27, p. 16).

Other positions available on or about August 21, 2003, included **shuttle bus driver** for Copa Casino at a wage rate of $7.00 per hour, **security guard** for Pinkerton Security working sixteen to forty hours per week at a wage rate of $5.90 per hour, and full and part-time **fuel booth attendants** for Coastal Energy at a wage rate of $6.15 per hour. Physical requirements for these positions are not included in the report. (EX-27, p. 16).

Vocational Rehabilitation Report by Ronnie Smith & Associates

Mr. Smith was engaged by the U. S. Department of Labor, Office of Worker's Compensation Programs. On May 3, 2004, Mr. Smith opined that Claimant was not willing to undergo vocational rehabilitation services due to his injury, health, and age. (EX-28, p. 1). Mr. Smith closed Claimant's file based on his conversation with Claimant's attorney. (EX-28, p. 3).

Other Vocational Evidence

On February 10, 2004, Claimant sent correspondence to Michael Moffett, USDOL, Mary Switzer, Workmen's Comp Rep, Tom Dulin, Claimant's Attorney, and Ronnie Smith, Work Rehab Counselor, in which he outlined problems with his assigned job of driving a forklift and suggested specific alternative positions with Employer. (CX-31, p. 19).

Claimant applied for twelve jobs in the period from May through July 2004. (CX-27, pp. 1-2).

The Contentions of the Parties

Claimant contends that he is permanently totally disabled due to aggravation of his conditions of diabetes, hypertension, and cancer which pre-existed his work-related injuries. Claimant further contends that the work-related injury and aggravation of pre-existing conditions resulted in or contributed to his present conditions involving his head, neck, shoulders, hands, wrists, bladder, eyes, teeth, hernia, sleep disorder, fatigue, dizziness, and chronic pain, and Employer is therefore liable for medical expenses associated with these conditions, and compensation. Claimant also contends that he has received only a scheduled payment for partial disability of 5% loss of use of one hand, although Employer acknowledges liability for both hands.

The Office of the Solicitor contends Employer is not entitled to Section 8(f) relief due to the absolute defense of failure to timely file a fully documented application, or alternatively, because Employer has failed to establish any of the requisite elements that (1) Claimant had a pre-existing permanent partial disability; (2) the pre-existing condition was manifest to Employer; and (3) the pre-existing condition combined with the work-related injury to contribute to a materially and substantially greater disability than would have resulted from the work-related injury alone.

Employer contends that the absolute defense does not apply in this case because at informal conference Claimant sought continuing temporary total disability. Employer further contends it paid for a 5% scheduled disability to both hands, it has established suitable alternative employment for Claimant, and that his medical problems, other than those to which Employer specifically conceded, are not causally related to, nor were they aggravated by his work-related injury. Therefore, Employer contends it is liable for only those medical expenses associated with Claimant's hand and neck injury. Employer acknowledges liability for 5% scheduled injury to both hands, and permanent partial whole man disability based on the difference between Claimant's average weekly wage and a $300 per week earning capacity.

Employer contends in brief that Claimant's urologic problems, hernia, vision problems, and sleep apnea are not causally related to his compensable injury of May 17, 2002. (Employer's Brief p. 11).

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

It is also noted that the opinion of a treating physician may be entitled to greater weight than the opinion of a non-treating physician under certain circumstances. Black & Decker Disability Plan v. Nord, 538 U.S. 822, 830, 123 S.Ct 1965, 1970 n. 3 (2003)(in matters under the Act, courts have approved adherence to a rule similar to the Social Security treating physicians rule in which the opinions of treating physicians are accorded special deference)(citing Pietrunti v. Director, OWCP, 119 F.3d 1035 (2d Cir. 1997)(an administrative law judge is bound by the expert opinion of a treating physician as to the existence of a disability "unless contradicted by substantial evidence to the contrary")); Rivera v. Harris, 623 F.2d 212, 216 (2d Cir. 1980)("opinions of treating physicians are entitled to considerable weight"); Loza v. Apfel, 219 F.3d 378 (5th Cir. 2000)(in a Social Security matter, the opinions of a treating physician were entitled to greater weight than the opinions of non-treating physicians).

A. The Compensable Injury

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2). Section 20(a) of the Act provides a presumption that aids the Claimant in establishing that a harm constitutes a compensable injury under the Act. Section 20(a) of the Act provides in pertinent part:

> In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary- that the claim comes within the provisions of this Act.

33 U.S.C. § 920(a).

The Benefits Review Board (herein the Board) has explained that a claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981), aff'd sub nom. Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1986); Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990). These two elements establish a **prima facie** case of a compensable "injury" supporting a claim for compensation. Id.

1. Claimant's Prima Facie Case

In the instant case, the parties have stipulated that a compensable injury occurred on May 17, 2002. Employer acknowledges Claimant's resulting cervical problems and a five percent loss of use to both of Claimant's hands.

Claimant's **credible** subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case and the invocation of the Section 20(a) presumption. See Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359, 14 BRBS 984 (CRT)(5th Cir. 1982).

Based on the stipulations of the parties, Claimant has established a **prima facie** case that he suffered an "injury" under the Act, having established that he suffered a harm or pain on May 17, 2002, and that his working conditions and activities on that date could have caused the harm or pain sufficient to invoke the Section 20(a) presumption. Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1988).

2. Employer's Rebuttal Evidence

Once Claimant's **prima facie** case is established, a presumption is invoked under Section 20(a) that supplies the causal nexus between the physical harm or pain and the working conditions which could have cause them.

The burden shifts to the employer to rebut the presumption with substantial evidence to the contrary that Claimant's condition was neither caused by his working conditions nor aggravated, accelerated or rendered symptomatic by such conditions. See Conoco, Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187 (CRT)(5th Cir. 1999); Gooden v. Director, OWCP, 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998); Louisiana Ins. Guar. Ass'n v. Bunol, 211 F.3d 294, 34 BRBS 29(CRT)(5th Cir. 1999); Lennon v. Waterfront Transport, 20 F.3d 658, 28 BRBS 22 (CRT)(5th Cir. 1994). "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. Avondale Industries v. Pulliam, 137 F.3d 326, 328 (5th Cir. 1998); Ortco Contractors, Inc. v. Charpentier, 332 F.3d 283 (5th Cir. 2003) (the evidentiary standard necessary to rebut the presumption under Section 20(a) of the Act is "less demanding than the ordinary civil requirement that a party prove a fact by a preponderance of evidence").

Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). See Smith v. Sealand Terminal, 14 BRBS 844 (1982). The testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. See Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984).

When aggravation of or contribution to a pre-existing condition is alleged, the presumption still applies, and in order to rebut it, Employer must establish that Claimant's work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury or pain. Rajotte v.

General Dynamics Corp., 18 BRBS 85 (1986). A statutory employer is liable for consequences of a work-related injury which aggravates a pre-existing condition. See Bludworth Shipyard, Inc. v. Lira, 700 F.2d 1046 (5th Cir. 1983); Fulks v. Avondale Shipyards, Inc., 637 F.2d 1008, 1012 (5th Cir. 1981). Although a pre-existing condition does not constitute an injury, aggravation of a pre-existing condition does. Volpe v. Northeast Marine Terminals, 671 F.2d 697, 701 (2d Cir. 1982). It has been repeatedly stated employers accept their employees with the frailties which predispose them to bodily hurt. J. B. Vozzolo, Inc. v. Britton, supra at 147-148.

If an administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. Universal Maritime Corp. v. Moore, 126 F.3d 256, 31 BRBS 119(CRT)(4th Cir. 1997); Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985); Director, OWCP v. Greenwich Collieries, supra.

In this case, Employer contends that Claimant's medical problems, other than cervical and hand conditions, are not causally related to his compensable injury, and therefore are not compensable. Specifically, Employer contends in brief that Claimant's urological condition, hernia, vision problems, sleep apnea, diabetes and hypertension are unrelated to Claimant's compensable injury of May 17, 2002.

In support of this position, Employer relies upon opinions by Claimant's various doctors, and a lack of medical evidence establishing a causal relationship between Claimant's other ailments and the compensable injury or aggravation of Claimant's pre-existing conditions. Specifically, concerning Claimant's urologic problems, Employer cites Claimant's denial of perineal injury, and an opinion by Dr. Lyell that Claimant's urologic problem was related to his diabetes. Employer cites a lack of evidence linking Claimant's gall bladder, hernia, and vision problems to the compensable injury or aggravation of other conditions, and an opinion by Dr. Longnecker that Claimant's vision problem was unrelated to the accident. Additionally, Employer notes that the timing of Claimant's gall bladder, hernia, and vision problems is not in close proximity to the work-related injury.

Concerning Claimant's sleep apnea, Employer cites an opinion by Dr. Kesler that it is not a direct result of Claimant's injury and that the sleep apnea aggravated Claimant's pain. Employer contends that the sleep apnea is therefore not

compensable as a pre-existing condition aggravated by the work-related injury because "the aggravation rule does not work in reverse." Employer cites Leach v. Thompson's Dairy, Inc., 13 BRBS 5231 (1981) for this proposition.

The record contains documentation of multiple medical conditions pre-existing the work-related injury, including prostate cancer, gangrene of the testes, high blood pressure, and diabetes. While aggravation of these pre-existing conditions would be considered an injury, Volpe, supra, the Claimant bears the initial burden of establishing that the maladies in question were caused or aggravated by the compensable injury. Greenwich, supra.

With regard to Claimant's hernia, gall bladder, vision, and sleep disorders, the record is devoid of direct evidence or testimony that states unequivocally the relationship between the maladies and the work-related injury or an aggravation to a pre-existing problem.

Accordingly, I find that the presumption of work-related injury or aggravation with regard to these conditions has been rebutted by Employer. Each will be examined weighing all of the evidence.

The record contains an opinion by Dr. Lyell, who treated Claimant for his urologic problems, on May 29, 2002, that he "told the patient that it [urinary retention] could be from his fall." As cited by Employer, Dr. Lyell later noted on June 27, 2002, Claimant "probably had some problems with bladder dysfunction due to his diabetes which accounted for part of his problem voiding." Dr Lyell's statement taken together establish his medical opinion that Claimant's urinary problem, specifically voiding, could have been caused, at least in part, by the compensable accident on May 17, 2002. This is sufficient to establish a **prima facie** case and invoke the Section 20(a) presumption with regard to this condition. Accordingly, I find that the presumption of work-related injury or aggravation with regard to Claimant's urinary condition has not been rebutted by Employer.

3. Weighing All the Evidence

Assuming, **arguendo**, that Employer provided sufficient evidence to rebut Claimant's **prima facie** case with regard to all of Claimant's maladies in question, I will proceed to weigh all the record evidence.

Claimant's urological problems

Claimant testified he had prostate surgery in 2001, and had a slight urine leakage prior to the compensable injury.

Immediately after his May 17, 2002 compensable accident, Claimant presented to Singing River Hospital. Hospital personnel noted his urinalysis was "trace positive for blood." No abdominal pain was noted. Claimant testified that the evening of the fall he experienced problems voiding and had to be catheterized. He stated he had not experienced the problem prior to the fall. Dr. Longnecker's records contain a history given by Claimant that the catheterization was performed by Dr. Lyell.

The following day, May 18, 2002, Claimant presented to Ocean Springs Hospital. Dr. Douglas McDowell, the attending physician noted the catheter and that Claimant had pain and burning on urination. A history was given that Claimant had not had this problem prior to the accident. On May 20, 2002, Claimant presented to Employer's representative Sybil Bouman, RN, who noted a "large bruised area just below left rib cage" among other observations.

Claimant was again treated for urinary retention on May 21, 2002, and presented to Dr. Mark S. Lyell on May 29, 2002. Dr. Lyell noted Claimant had not had any perineal injuries of which he was aware. Dr. Lyell also noted on that date: "I told the patient that it could be from his fall." Therefore, because Dr. Lyell made this statement to Claimant at the same visit in which he noted no perineal injury, Dr. Lyell, held the medical opinion that Claimant's problem voiding could have been caused by the compensable injury.

On May 30, 2002, Dr. Lyell performed a "resection of the bladder neck contracture." At a post surgery follow-up visit on June 27, 2002, Dr. Lyell noted Claimant "probably had some problems with bladder dysfunction due to his diabetes which accounted for part of his problem voiding." Since Dr. Lyell stated that Claimant's diabetes accounted for only part of Claimant's problem voiding, another partial cause is implied. Since Dr. Lyell made no indication that he no longer considered the May 17, 2002 injury a possible cause, the remaining "partial cause" of Claimant's condition would arguably be the compensable injury.

Claimant's burden is not to show that work-related injury or accident was the only cause of harm. Rather, if Claimant establishes that his work environment played any role in the manifestation of the disease, the non-work-relatedness of the disease itself is irrelevant. Cairns, Supra.

Based on the foregoing, I find and conclude that, Claimant has established that his urological condition was, at least in part, the result of Claimant's work-related injury. Therefore, under these circumstances, Claimant has established his entitlement to benefits and medical care and treatment under the Act for such condition.

Claimant's diabetes and hypertension

Dr. Longnecker testified that the pain Claimant suffered as a result of the compensable injury probably worsened his hypertension, although he could not document that. This is apparently based on Dr. Longnecker's general knowledge of hypertension and not on the specific circumstances of Claimant's case. General supposition is insufficient to establish a medical opinion that a condition was more likely than not aggravated by another cause. The record is devoid of medical opinion purporting to link an aggravation of Claimant's diabetes to his compensable injury.

Therefore, while it is well documented that Claimant's conditions of diabetes and hypertension pre-existed the compensable injury, the record lacks evidence to establish that these conditions were aggravated by Claimant's compensable injury.

Accordingly, I find that Claimant's conditions of diabetes and hypertension were neither caused by nor aggravated by his compensable injury of May 17, 2002. Consequently, Claimant is due no benefit under the Act based on these maladies.

Claimant's pancreas, hernia, and gall bladder problems

If there has been a subsequent non-work-related injury or aggravation, the Employer is liable for the entire disability if the second injury or aggravation is the natural or unavoidable result of the first injury. Atlantic Marine v. Bruce, supra; Cyr v. Crescent Wharf & Warehouse Co., 211 F.2d 454 (9th Cir. 1954)(if an employee who is suffering from a compensable injury

sustains an additional injury as a natural result of the primary injury, the two may be said to fuse into one compensable injury); Mijangos v. Avondale Shipyards, 19 BRBS 15 (1986).

Although causation of pancreatic problems is contended by Claimant in brief, there is no evidence of record establishing either the ailment or causation.

On October 15, 2003, over a year after the compensable injury, Dr. Frank Martin performed surgery to remove Claimant's gall bladder and address his hernia. Claimant's gall bladder was acutely inflamed, and had areas of gangrene. Dr. Martin noted insulin dependent diabetes mellitus in his postoperative diagnosis.

The record does not contain evidence that Claimant's gall bladder or hernia were causally related to or aggravated by Claimant's compensable injury. Additionally, there is no evidence that they were a natural or unavoidable result of any of Claimant's other conditions.

Accordingly, I find that Claimant's pancreas, gall bladder, and hernia conditions were neither caused by nor aggravated by his compensable injury of May 17, 2002. Consequently, Claimant is due no benefit under the Act based on these maladies.

Claimant's vision problem

Immediately following the compensable injury on May 17, 2002, Dr. Seymour, the attending physician at Singing River Hospital noted Claimant had left periorbital (eye area) contusion. Three days later, Employer's representative Sybil Bouman, RN, also noted swelling of the left eye. Claimant's glasses were also broken in the accident, and apparently replaced at Employer's expense.

Claimant testified that he sees a "floater coming by" and has fogginess of his left eye, which began about a week after the May 2002 injury. He also stated that he continues to have blurred vision. While the timing of the onset of Claimant's eye symptoms would appear to suggest a causal relationship to the compensable injury, the timing alone is insufficient to establish the causal relationship.

The record also contains several references to treatment by Dr. Benefield for diabetic retinopathy for several years. Claimant testified that Dr. Benefield had performed laser surgeries prior to his injury.

The medical records of Dr. Benefield were submitted into evidence. The record does not contain any medical opinion that Claimant's current loss of vision or any of his eye problems are causally related to the compensable injury. Since aggravation of Claimant's diabetes has not been established, any relationship between Claimant's diabetes and eye problems is not relevant. Also, Dr. Longnecker testified, that to his knowledge, Claimant's eye problem was not related to his injury on May 17, 2002.

Based on the foregoing, I find and conclude that Claimant's eye problems were neither caused by nor aggravated by his compensable injury of May 17, 2002. Consequently, Claimant is due no benefit under the Act based on these maladies.

Claimant's sleep disorder

Employer cites a notation by Dr. Kesler that sleep apnea was unrelated to his other maladies but may worsen Claimant's chronic pain. Citing Leach v. Thompson's Dairy, supra, Employer contends that if Claimant's sleep apnea is a pre-existing condition, the aggravation rule will not apply because the sleep apnea was not aggravated.

On August 12, 2002, Claimant's physical therapist noted that Claimant related he had moderate difficulty with sleep because of pain which kept him from falling asleep.

Upon examination of Claimant on December 23, 2002, Dr. Kesler also noted that Claimant had difficulty sleeping because of awakening with pain, but also had symptoms of sleep apnea which were daytime somnolence and naps, trouble falling back to sleep when he awakens at night, and snoring. He ordered a polysomnography and noted "though it [sleep apnea] is not directly related, it may worsen chronic pain states." The test revealed obstructive events during all stages of sleep, i.e. sleep apnea.

Claimant was prescribed a CPAP (continuous positive airway pressure) machine which Dr. Kesler noted on February 13, 2003, was helping. Claimant testified that he frequently uses the CPAP, which he describes as a small oxygen machine to aid sleep. He further testified, the machine helps his sleep but does not stop the pain which interrupts his sleep.

In Leach v. Thompson's Dairy, supra, the claimant sustained a compensable back injury in February 1967, but continued working. Later that year, he suffered a myocardial infarction, apparently unrelated to his compensable injury, which rendered him permanently totally disabled. The Board held that because the myocardial infarction did not pre-date the compensable injury, only the portion of disability attributable to the back injury was compensable.

Therefore, the proposition advanced in Leach v. Thompson's Dairy, supra, is that additional disability attributable to an event occurring after the compensable injury, akin to an intervening or superceding event, is not compensable. Employer's reliance on Leach v. Thompson's Dairy, supra, as a limitation on the aggravation rule is misplaced.

The operative question is whether or not Claimant's sleep apnea pre-existed the compensable injury, or if it did not, is it a natural and unavoidable consequence of the compensable injury. If the sleep apnea pre-existed the compensable injury, the fact that the sleep apnea combined with the work-related injury to worsen Claimant's pain is sufficient to constitute an "aggravation" to the pre-existing condition and thus render it compensable. If the sleep apnea developed as a consequence of the work-related injury, it is likewise compensable.

The record does not contain a medical opinion as to when his sleep apnea began. The earliest reference to Claimant's sleep problems was on August 12, 2002, approximately three months after the compensable injury.

No intervening cause is documented between the compensable injury and August 2002, that would have triggered Claimant's sleep apnea. The only medical treatment of record that Claimant was receiving at that time was for conditions related to the compensable injury, including treatment for urological problems. The only documented intervening factor that directly affected Claimant's sleep was pain due to the work-related injury.

Based on the foregoing, I find and conclude that Claimant's sleep apnea was either a pre-existing condition or was rendered symptomatic by the work-related accident or treatment incidental thereto. As such, Claimant's sleep apnea constitutes an "injury" within the purview of the Act and is compensable.

Weighing all of the evidence, I find that the preponderance of evidence indicates that Claimant's urological and sleep apnea conditions are causally related to the compensable injury. Therefore, Claimant has established his entitlement to benefits under the Act.

B. Nature and Extent of Disability

The parties stipulated that Claimant suffers from a compensable injury, however the burden of proving the nature and extent of his disability rests with the Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, supra, at 60. Any disability suffered by Claimant before reaching maximum medical

improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra, at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a **prima facie** case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994).

Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

C. Maximum Medical Improvement (MMI)

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, n. 5 (1985); Trask v. Lockheed Shipbuilding Construction Co., supra; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

In the present matter, nature and extent of disability and maximum medical improvement will be treated concurrently for purposes of explication.

Dr. Kesler assigned a date of maximum medical improvement of July 21, 2003, with regard to Claimant's neck, and Dr. Longnecker assigned August 21, 2003, as the date of maximum medical improvement of Claimant's hands. The parties have stipulated and I find that Claimant reached MMI for all work-related injuries on August 21, 2003.

Since Claimant reached MMI on August 21, 2003, the nature of Claimant's disability, should disability be found to exist, is permanent as of that date. A failed attempt to return to regular employment for Employer in January 2004, does not impact this finding.

Prior to his compensable injury, Claimant's work duties for Employer consisted primarily of material retrieval including driving a fork lift/tow motor, which is specifically prohibited under restrictions imposed by Dr. Longnecker. It is uncontroverted, and I find, that Claimant is incapable of returning to his prior employment.

Based on the foregoing, I find that Claimant reached maximum medical improvement on August 21, 2003, and he is permanently unable to return to his former regular employment as a result of his work-related injury. Claimant has therefore established a **prima facie** case of permanent total disability. Since the extent of disability is an economic as well as a medical inquiry, the extent of disability will be determined by whether or not suitable alternative employment is shown, and the economic value of such employment.

D. Suitable Alternative Employment

If the claimant is successful in establishing a **prima facie** case of total disability, the burden of proof is shifted to employer to establish suitable alternative employment. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

> (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?

> (2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?

Id. at 1042. Turner does not require that employers find specific jobs for a claimant; instead, the employer may simply demonstrate "the availability of general job openings in certain fields in the surrounding community." P & M Crane Co. v. Hayes, 930 F.2d 424, 431 (1991); Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039 (5th Cir. 1992).

However, the employer must establish **the precise nature and terms** of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and that it is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988). The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. Villasenor v. Marine Maintenance Industries, Inc., 17 BRBS 99 (1985); See generally Bryant v. Carolina Shipping Co., Inc., 25 BRBS 294 (1992); Fox v. West State, Inc., 31 BRBS 118 (1997). Should the requirements of the jobs be absent, the administrative law judge will be unable to determine if claimant is physically capable of performing the identified jobs. See generally P & M Crane Co., supra at 431; Villasenor, supra. Furthermore, a showing of only one job opportunity may suffice under appropriate circumstances, for example, where the job calls for **special skills** which the claimant possesses and there are few qualified workers in the local community. P & M Crane Co., supra at 430. Conversely, a showing of one unskilled job may not satisfy Employer's burden.

Once the employer demonstrates the existence of suitable alternative employment, as defined by the Turner criteria, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. Turner, supra at 1042-1043; P & M Crane Co., supra at 430. Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work." Turner, supra at 1038, quoting

Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003 (5th Cir. 1978). The claimant's obligation to seek work does not displace the employer's **initial** burden of demonstrating job availability. Roger's Terminal & Shipping Corp. v. Director, OWCP, 784 F.2d 687, 691, 18 BRBS 79, 83 (CRT) (5th Cir.), cert. denied, 479 U.S. 826 (1986); Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989).

The Benefits Review Board has announced that a showing of available suitable alternate employment may not be applied retroactively to the date the injured employee reached MMI and that an injured employee's total disability becomes partial on the earliest date that the employer shows suitable alternate employment to be available. Rinaldi v. General Dynamics Corporation, 25 BRBS at 131 (1991).

1. Claimant's Work Restrictions

The vocational report by Mr. Tommy Sanders utilized work restrictions imposed by the FCE as further refined by Drs. Longnecker and Kesler. These restrictions were no overhead work or overhead lifting, crawling, repetitive work (with hands), or lifting over 10 pounds, and no operation of a fork lift. Restrictions allowed occasional bending, squatting, reaching above shoulder, and climbing.

The medical records contain numerous statements by Dr. Longnecker that elaborate upon the restrictions imposed on Claimant, and his reasoning in imposing such restrictions. He released Claimant to perform light duty work in August 2003, but most recently opined that Claimant is physically unable to perform any type of work. Dr. Longnecker agreed that, absent Claimant's vision problem, Claimant could have done some light work. Dr. Kesler released Claimant to light duty work in July 2003, pursuant to the FCE, and opined that Claimant did not qualify for disability. Dr. Smith opined on March 25, 2003, that Claimant could return to work with restrictions.

Employer contends that Dr. Longnecker's opinion regarding Claimant's ability to work contains contradictions and is contrary to the weight of the medical evidence. Therefore should be disregarded.

Dr. Longnecker has treated Claimant since August 2002. His medical records contain comments wherein he has consistently questioned Claimant's ability to return to any work, and opined that Claimant should retire. In October 2002, Dr. Longnecker

noted "I am thinking he (Claimant) is probably going to consider retiring, which probably is appropriate with the medical problems as well as the neck problems he is having." Again, on March 11, 2003, Dr. Longnecker noted "As far as a return to work . . . with the multiple problems he has, he should consider retirement." Also, Dr. Longnecker testified that he expected Claimant's condition to worsen because of his ailments unrelated to the injury. When considered in the context of the complete medical records, Dr. Longnecker's opinions regarding Claimant's ability to work are consistent.

Dr. Kesler acknowledged Claimant's ongoing problems with pain and prescribed a soft cervical collar. Dr. Smith referred Claimant to Dr. Edward F. Aldridge for cervical epidural steriod injections for pain. Dr. Aldridge noted that Claimant experienced only short term pain relief after injections. The final documented injection was performed on May 27, 2004, well after Dr. Smith released Claimant to return to work. Although Drs. Kesler and Smith released Claimant to light work, both have also acknowledged that Claimant has an ongoing and continuous problem with pain, which is attributable to the compensable injury.

Dr. Longnecker has monitored Claimant's condition for a longer period of time and he has discussed in medical records a greater range of Claimant's maladies than have Drs. Kesler and Smith. Additionally, nothing in the record suggests an impingement upon Dr. Longnecker's credibility. Accordingly, I find that Dr. Longnecker's testimony and opinions are credible and I afford his opinion greater weight than Drs. Kesler and Smith.

Further, Employer correctly contends that it is not liable for Claimant's disability attributable to a subsequent injury or worsening of a condition which is not work-related.

Employer is liable for a compensable injury and later worsening of conditions attributable to that work-related injury. Concerning a claim for additional compensation based on a change in condition, the Board opined: "a claim for further compensation, based on the worsening of a prior work-related injury, is essentially a claim for a greater loss of wage-earning capacity attributable to the original injury." Leach v. Thompson's Dairy, supra.

In the instant case, Employer is liable for the worsening of conditions found to have resulted from the compensable injury, i.e. hand, cervical, urological, and sleep problems, but not Claimant's other maladies. Therefore, work restrictions assigned by Dr. Longnecker must be examined with regard to whether and to what extent they were imposed as a result of the compensable injury, versus those imposed as a result of Claimant's conditions which were not related to the compensable injury.

Dr. Longnecker stated that but for Claimant's vision problems, he felt Claimant could perform some type of work. Having found that Claimant's vision problems are unrelated to the compensable injury, the limitation resulting from vision problems will not be considered in a determination of Claimant's work restrictions.

Prior to Claimant's attempt to return to work, Dr. Longnecker noted on July 21, 2003, that Claimant "cannot turn his head side to side, so it pretty much rules out driving a tow motor." Dr. Longnecker imposed a blanket restriction against operation of a fork lift/tow motor on March 11, 2004, because fork lift driving required repeated turning of the head and bouncing up and down. Dr. Longnecker testified that he also imposed work restrictions of no lifting over 10 pounds, and no repetitive use of hands, in addition to the restrictions listed in the FCE. Since these restrictions affect Claimant's hands and cervical region, they were imposed as a result of the compensable injury and are properly included in Claimant's work restrictions.

Finally, Dr. Longnecker noted on August 30, 2004, "he [Claimant] has constant pain with increased levels of activity . . . he still cannot grip well . . . and his neck hurts him constantly . . . he is disabled for gainful employment and will remain so indefinitely." This comment by Dr. Longnecker is an additional work restriction in that increased activity levels bring on debilitating pain. Since this restriction affects Claimant's hands and back, it was imposed as a result of the compensable injury and is properly included in Claimant's work restrictions.

Therefore, of the restrictions imposed by Dr. Longnecker, only the restriction against Claimant working at any activity is attributable to the non-work-related condition of Claimant's vision. All other restrictions are based on conditions which are consequences of the compensable injury.

Based on the foregoing, I find that Claimant's work restrictions consist of light work as outlined in the FCE, with additional restrictions of no overhead work or overhead lifting, crawling, repetitive use of the hands, lifting over 10 pounds, operation of a fork lift, no sustained increased activity level, nor any activity that requires repeated turning of the head, or bouncing up and down. Restrictions allow occasional bending, squatting, reaching above shoulder, and climbing.

2. Job Requirements and Analysis

Employer contends that suitable alternative employment has been demonstrated as set forth in a vocational report by Mr. Tommy Sanders. The report dated June 4, 2004, and updated on March 1, 2006, identified the following jobs as suitable alternative employment.

A determination of whether any of these positions constitute suitable alternative employment for Claimant would be dependent upon the amount, if any, of restricted activity the specific position entails.

The position of full-time **security guard** at Swetman Security was identified as available about January 2004, June 2004, and March 2006. The wage rate ranged from $7.00 to $8.00 per hour. Physical requirements varied depending upon the work site, and may include varying degrees of sitting, standing and walking, occasional to frequent handling and lifting of five to ten pounds. Duties may also include foot patrol, gate guard duties, monitoring, and logging information.

Some of the physical requirements identified would require a sustained increased activity level which is outside of Claimant's work restrictions. Also, frequent lifting of items within Claimant's weight restriction would require repetitive use of Claimant's hands, which is also exceeds Claimant's work restrictions.

As specific requirements of the individual positions are not included, insufficient information is supplied for a proper determination. Accordingly, I find that the position of security guard with Swetman Security does not constitute suitable alternative employment.

The positions of full-time **desk clerk** at a wage of $6.50 per hour, and full-time **security guard** were available at Country Inn in January 2004. Insufficient information on the physical requirements of each position is provided for a determination of whether these positions constitute suitable alternative employment. Accordingly, I find that the positions of desk clerk and security guard with Country Inn do not constitute suitable alternative employment.

The position of **security guard** with Boomtown Casino was available in June 2004. The position was a full-time position with a wage rate of $7.50 per hour. Physical requirements were lifting of five to ten pounds, and frequent to constant standing and walking. The physical requirements of frequent to constant standing and walking constitute sustained increased activity, which exceeds Claimant's restrictions. As noted above, frequent lifting of weights exceeds Claimant's restrictions because it requires repetitive use of his hands. Accordingly, I find that the position of security guard with Boomtown Casino does not constitute suitable alternative employment.

The full-time position of **security clerk** with Grand Casino was available in June 2004. This job is listed on correspondence to Claimant dated June 4, 2004, the second page of which is absent from the record. The position description contains only a partial list of responsibilities and physical requirements. As the record contains insufficient information for a determination, I find that the position of security clerk with Grand Casino does not constitute suitable alternative employment.

A follow-up labor market survey on March 1, 2006, listed the following jobs as available at that time. (EX-27, p. 15).

A full-time position of **front desk clerk** with Wingate Hotel was identified as available in March 2006. Duties included keeping lobby clean, checking guests in and out, answering the telephone and folding towels on night shift. Physical requirements were lifting of two to five pounds, alternate sitting, standing and walking with frequent use of the upper extremities.

Repetitive use of the hands, as would be required for tasks such as lifting, answering telephone calls, cleaning, and folding towels, is outside of Claimant's work restrictions. Depending upon frequency, standing and walking may arguably require a sustained increase in physical activity which is

beyond Claimant's work restrictions. Therefore, I find that the position of front desk clerk does not constitute suitable alternative employment.

A full-time position as **front desk clerk trainee** with Howard Johnson's was identified as available in March 2006. Duties included answering the telephone, booking rooms, checking guests in and out, and cleaning the lobby. Physical requirements included lifting two to five pounds, frequent sitting, standing and walking, infrequent pushing and pulling of two to five pounds, and twisting and bending when utilizing a mop or broom. (EX-27, p. 16).

As with the position with Wingate Hotel, this position includes physical requirements which are outside of Claimant's physical restrictions. Cleaning, telephone work, and lifting require repetitive use of the hands which is beyond Claimant's restrictions. Further, the listed activities may require sustained physical activity which is beyond Claimant's work restrictions. Therefore, I find that the position of front desk clerk trainee does not constitute suitable alternative employment.

Other positions listed as available on or about August 21, 2003, were **shuttle bus driver** for Copa Casino, full and part-time **security guard** positions for Pinkerton Security, and full and part-time **fuel booth attendants** for Coastal Energy. The physical requirements for these positions are not included in the report. It is likely that the position of bus driver would require activity such as turning of the head and exposure to bouncing and jarring which is incompatible with Claimant's work restrictions. Likewise, the fuel booth attendant would likely involve repetitive use of the hands which is also outside of Claimant's work restrictions. As the record contains insufficient information for a proper determination, I find that the positions of shuttle bus driver, security guard, and fuel booth attendant do not constitute suitable alternative employment.

Finally, Employer refers to several comments by Claimant's doctors and his lack of effort in its contention that Claimant has not demonstrated any genuine effort toward a return to employment.

In October 2002, Dr. Smith noted "he (Claimant) has made it known to the physical therapist and to me, that he does not like his job and does not plan to go back to it . . . he said that he

has worked at that job for 27 years, and he has seen too many arguments, and too many people asked to work beyond their restrictions." Claimant testified that his job search in 2004 was undertaken on the advice of his attorney. At that time, he applied for some jobs that were beyond his physical restrictions and did not apply for others which he considered to offer insufficient pay. Claimant has not searched for work since 2004. Dr. Longnecker opined that Claimant is no longer capable of any type of work.

3. Conclusion

Based on the foregoing, I find and conclude Employer has not demonstrated suitable alternative employment and Claimant is entitled to temporary total disability benefits from May 17, 2002 to July 7, 2002, and from July 15, 2002 to August 20, 2003, and permanent total disability from August 21, 2003, to present and continuing, based on his average weekly wage of $652.40.

I further find that Claimant has not demonstrated diligent effort in securing alternative employment. However, having found that Employer has not met its burden to establish suitable alternative employment, this issue is rendered moot.

E. Entitlement to Medical Care and Benefits

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a).

The Employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the Employer, the expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must also be appropriate for the injury. 20 C.F.R. § 702.402.

A claimant has established a **prima facie** case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

Section 7 does not require that an injury be economically disabling for claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 187.

Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1980); Wendler v. American National Red Cross, 23 BRBS 408, 414 (1990).

An employer is not liable for past medical expenses unless the claimant first requested authorization prior to obtaining medical treatment, except in the cases of emergency, neglect or refusal. Schoen v. U.S. Chamber of Commerce, 30 BRBS 103 (1997); Maryland Shipbuilding & Drydock Co. v. Jenkins, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), rev'g 6 BRBS 550 (1977). Once an employer has refused treatment or neglected to act on claimant's request for a physician, the claimant is no longer obligated to seek authorization from employer and need only establish that the treatment subsequently procured on his own initiative was necessary for treatment of the injury. Pirozzi v. Todd Shipyards Corp., 21 BRBS 294 (1988); Rieche v. Tracor Marine, 16 BRBS 272, 275 (1984).

The employer's refusal need not be unreasonable for the employee to be released from the obligation of seeking his employer's authorization of medical treatment. See generally 33 U.S.C. § 907 (d)(1)(A). Refusal to authorize treatment or neglecting to provide treatment can only take place after there is an opportunity to provide care, such as after the claimant requests such care. Mattox v. Sun Shipbuilding & Dry Dock Co., 15 BRBS 162 (1982). Furthermore, the mere knowledge of a claimant's injury does not establish neglect or refusal if the claimant never requested care. Id.

Employer asserts it is not responsible for medical expenses unrelated to Claimant's hand and neck. Further, Employer contends it is not responsible for the services of Drs. Benefield and Martin, who treated Claimant's eye, gall bladder, and hernia, due to lack of a request for treatment by Claimant,

even if such services are found related to the compensable injury. The issue of lack of request for treatment is only raised by Employer with regard to these two doctors. Employer concedes liability for Dr. Kesler's services for EMG/NCV studies and Botox injections, but maintains that it has no liability for treatment for sleep apnea which is unrelated to the compensable injury.

Having found that Claimant's eye/vision, pancreas, gall bladder, and hernia problems are unrelated to the compensable injury, Employer is not liable for payment of medical expenses related solely to those maladies. Drs. Benefield and Martin rendered services in these areas.

Employer is liable for medical expenses associated with Claimant's medical problems found herein to be compensable. Particularly, Claimant's urological and sleep problems in addition to the cervical and hand problems to which Employer stipulated liability.

V. Section 8(f) Application

Section 8(f) of the Act provides in pertinent part:

> (f) Injury increasing disability: (1) In any case which an employee having an existing permanent partial disability suffers [an] injury . . . of total and permanent disability or of death, found not to be due solely to that injury, of an employee having an existing permanent partial disability, the employer shall provide in addition to compensation under paragraphs (b) and (e) of this section, compensation payments or death benefits for one hundred and four weeks only.
>
> (2)(A) After cessation of the payments . . . the employee . . . shall be paid the remainder of the compensation that would be due out of the special fund established in section 44 . . . 33 U.S.C. § 908(f).

Section 8(f) shifts liability for permanent partial or permanent total disability from the employer to the Special Fund when the disability is not due solely to the injury which is the subject of the claim. Director, OWCP v. Cargill Inc., 709 F.2d 616, 619 (9th Cir. 1983).

The Regional Solicitor has filed a brief in opposition to 8(f) relief in which it is contended that Employer is not due relief because: (1) Employer's failure to timely file a fully documented application for relief with the District Director as soon as permanency of the Claimant's condition became known or at issue is an absolute bar to recovery, see 30 C.F.R. § 702.321; or alternatively (2) that Employer has failed to establish the three prerequisites to entitlement as outlined below.

Prerequisites to entitlement to relief under Section 8(f)

The employer must establish three prerequisites to be entitled to relief under Section 8(f) of the Act: (1) the claimant had a pre-existing permanent partial disability; (2) the pre-existing disability was manifest to the employer; and (3) that the current disability is not due solely to the employment injury. 33 U.S.C. § 908(f); Two "R" Drilling Co., Inc. v. Director, OWCP, 894 F.2d 748, 750, 23 BRBS 34 (CRT) (5th Cir. 1990); Director, OWCP v. Campbell Industries, Inc., 678 F.2d 836 (9th Cir. 1982), cert. denied, 459 U.S. 1104 (1983); C&P Telephone Co. v. Director, OWCP, 564 F.2d 503 (D.C. Cir. 1977), rev'g 4 BRBS 23 (1976); Lockhart v. General Dynamics Corp., 20 BRBS 219, 222 (1988). In permanent partial disability cases, an additional requirement must be shown, i.e., that Claimant's disability is materially and substantially greater than that which would have resulted from the new injury alone. 33 U.S.C. §908(f)(1); Louis Dreyfus Corp. v. Director, OWCP, 125 F.3d 884 (5th Cir. 1997).

An employer may obtain relief under Section 8(f) of the Act where a combination of the claimant's pre-existing disability and his last employment-related injury result in a greater degree of permanent disability than the claimant would have incurred from the last injury alone. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co., 676 F.2d 1110 (4th Cir. 1982); Comparsi v. Matson Terminals, Inc., 16 BRBS 429 (1984). Employment related aggravation of a pre-existing disability will suffice as contribution to a disability for purposes of Section 8(f), and the aggravation will be treated as a second injury in such case. Strachan Shipping Company v. Nash, 782 F.2d 513, 516-517 (5th Cir. 1986)(en banc).

Section 8(f) is to be liberally applied in favor of the employer. Maryland Shipbuilding and Drydock Co. V. Director, OWCP, U.S. DOL, 618 F.2d 1082 (4th Cir. 1980); Director, OWCP v. Todd Shipyards Corp., 625 F.2d 317 (9th Cir. 1980), aff'g Ashley

v. Todd Shipyards Corp., 10 BRBS 423 (1978). The reason for this liberal application of Section 8(f) is to encourage employers to hire disabled or handicapped individuals. Lawson v. Suwanee Fruit & Steamship Co., 336 U.S. 198 (1949).

"Pre-existing disability" refers to disability in fact and not necessarily disability as recorded for compensation purposes. Id. "Disability" as defined in Section 8(f) is not confined to conditions which cause purely economic loss. C&P Telephone Company, supra. "Disability" includes physically disabling conditions serious enough to motivate a cautious employer to discharge the employee because of a greatly increased risk of employment related accidents and compensation liability. Campbell Industries Inc., supra; Equitable Equipment Co., Inc. v. Hardy, 558 F.2d 1192, 1197-1199 (5th Cir. 1977).

The pre-existing condition need not exist prior to the time of hiring, nor must the employee be impaired by his disability at the time of hire or retention. Rather, the requirement is only that the pre-existing condition is manifest to the employer at the time of the compensable (subsequent) injury. Director, OWCP v. Cargill, Inc., 709 F.2d 616 (9th Cir. 1983) (en banc), Director, OWCP v. Berkstressor, 921 F.2d 306 (D.C. Cir. 1990).

1. Pre-existing permanent partial disability

In brief, Employer contends that Claimant's conditions of insulin dependent diabetes and associated diabetic maladies, high blood pressure, gangrene of the testes, prostate cancer, and pancreatitis, together constituted a pre-existing disability which would motivate a cautious employer to discharge an employee from the employment in which Claimant was engaged, due to the increased risk of compensation liability. See Director, OWCP, v. General Dynamics Corp., 787 F.2d 723, 18 BRBS 88 (CRT)(1st Cir. 1986)(debilitating hypertension is a pre-existing disability); Dugan v. Todd Shipyards, 22 BRBS 42 (1989)(diabetes and hypertension are serious, pre-existing disabilities).

The Regional Solicitor cites the fact that Claimant was not working under restrictions prior to the compensable injury. However, under Cargill, supra, such does not negate establishment of pre-existing permanent partial disability.

As no evidence was introduced to establish the past or present existence of pancreatitis in Claimant, I find that pancreatitis is not a condition which pre-existed the compensable injury.

Whether or not a pre-existing condition would motivate an employer to discharge an employee because of increased risk must be viewed in light of the particular position in which the employee is employed. In the instant case, Claimant was employed handling materials and driving a fork lift/tow motor, which involved at least occasional heavy lifting. As noted by Mr. Walker, a vocational expert, lighting may have been insufficient in various areas in which Claimant was required to work at night, a condition which may have required consideration of Claimant's pre-existing diabetic retinopathy.

Although, as cited by the Regional Solicitor, medical records attached to Employer's petition are dated on or after the date of the compensable accident, Employer has also introduced medical records which pre-date the injury. I find that medical evidence and Claimant's credible testimony establish the existence of his pre-existing conditions as cited by Employer, except for pancreatitis.

While no one of Claimant's pre-existing maladies, when taken in isolation, may constitute a pre-existing disability for purposes of Section 8(f), I find that Claimant's pre-existing maladies, not including pancreatitis, when taken as a whole, do constitute a permanent partial disability that would motivate a cautious employer to discharge an employee from the employment in which Claimant was engaged, due to the increased risk of compensation liability.

2. Manifestation to the Employer

The judicially created "manifest" requirement does not mandate actual knowledge of the pre-existing disability. If, prior to the subsequent injury, employer had knowledge of the pre-existing condition, or there were medical records in existence from which the condition was objectively determinable, the manifest requirement will be met. Equitable Equipment Co., supra; See Eymard v. Sons Shipyard v. Smith, 862 F.2d 1220, 1224 (5th Cir. 1989).

The medical records need not indicate the severity or precise nature of the pre-existing condition for it to be manifest. Todd v. Todd Shipyards Corp., 16 BRBS 163, 167-168 (1984). If a diagnosis is unstated, there must be a sufficiently unambiguous, objective, and obvious indication of a disability reflected by the factual information contained in the available medical records at the time of injury. Currie, 23

BRBS at 426. Furthermore, a disability is not "manifest" simply because it was "discoverable" had proper testing been performed. Eymard & Sons Shipyard v. Smith, supra; C.G. Willis, Inc. v. Director, OWCP, 28 BRBS 84, 88 (CRT) (1994). There is not a requirement that the pre-existing condition be manifest at the time of hiring, only that it be manifest at the time of the compensable (subsequent) injury. Director, OWCP v. Cargill, Inc., 709 F.2d 616 (9th Cir. 1983) (en banc).

The manifest condition need not be "a serious condition that actually impairs the employee" at the time of hiring or retention; an asymptomatic disability may be sufficient to motivate an employment decision and fulfill the "manifest" requirement. Director, OWCP v. Berkstressor, supra, at 310.

Employer contends that Claimant's pre-existing conditions were constructively manifest in that his conditions were objectively determinable by pre-existing medical records or documents. In support of this contention, Employer references its Exhibit 32. The Regional Solicitor responds that medical records that do not pre-date the May 17, 2002 compensable injury cannot be used to support a finding of manifestation.

Although not attached to Employer's petition for Section 8(f) relief, medical evidence is included in the record to establish Claimant's pre-existing conditions. These include an April 1999 Ocean Springs Hospital discharge record after an operation for debridement of his scrotum for a gangrene condition. Claimant's discharge diagnosis described: 1. Fournier's gangrene, 2. hypertension, 3. insulin-dependent diabetes, 4. anemia, and 5. gastritis. An operative report from Ocean Springs Hospital lists Dr. Lyell's pre and post-operative diagnosis as adenocarcinoma of the prostate. The report states Dr. Lyell performed a radical retropubic prostatectomy and bilateral pelvic lymphadenectomy on November 6, 2001.

Therefore medical records were in existence prior to Claimant's compensable injury from which Claimant's pre-existing conditions were objectively determinable. Accordingly, I find and conclude that Claimant's pre-existing insulin dependent diabetes and associated diabetic maladies, high blood pressure, gangrene of the testes, and prostate cancer were manifest to Employer at the time of Claimant's May 2002 injury. I further find that Claimant's pancreatitis was not manifest to Employer.

3. The pre-existing disability's contribution to a greater degree of permanent disability

Section 8(f) will not apply to relieve Employer of liability unless it can be shown that an employee's permanent total disability was not due solely to the most recent work-related injury. Two "R" Drilling Co. v. Director, OWCP, supra. An employer must set forth evidence to show that a claimant's pre-existing permanent disability combines with or contributes to a claimant's current injury resulting in a greater degree of permanent partial or total disability. Id. If a claimant's permanent total disability is a result of his work injury alone, Section 8(f) does not apply. C&P Telephone Co., supra; Picoriello v. Caddell Dry Dock Co., 12 BRBS 84 (1980). Moreover, Section 8(f) does not apply when a claimant's permanent total disability results from the progression of, or is a direct and natural consequence of, a pre-existing disability. Cf. Jacksonville Shipyards, Inc. v. Director, OWCP, 851 F.2d 1314, 1316-1317 (11th Cir. 1988).

Employer contends that Claimant's conditions of insulin dependent diabetes and associated diabetic maladies, high blood pressure, gangrene of the testes, and prostate cancer combined with his work-related injury to contribute to a materially and substantially greater degree of disability than would have resulted from the work-related injury alone. In support, Employer cites Dr. Longnecker's testimony that Claimant's disability was "magnified and aggravated" by his underlying problems to make him more disabled.

Dr. Longnecker testified that in his opinion Claimant was totally disabled, however, absent his pre-existing conditions, Claimant would have been capable of performing light work. He further testified that Claimant's underlying problems of prostate cancer, gangrene of the testes, high blood pressure, and diabetes combined with his work-related injury to render Claimant materially and substantially more disabled than he would have been due to the injury alone.

Based on the foregoing, I find that Claimant's permanent total disability that occurred after his May 2002 work-related injury is not due solely to the instant accident. I find that Claimant's pre-existing conditions as stated above have combined with his work-related injury, causing him to be unable to return to his former job position as an outside surveyer, and resulting in a greater disability than that which would have resulted from the work-related injury alone.

Accordingly, I find and conclude that Employer established the three pre-requisites necessary for entitlement to Section 8(f) relief under the Act and is eligible to receive Section 8(f) relief.

The Absolute Defense

The Regional Solicitor contends the Memorandum of Informal Conference dated May 20, 2004, evidences that the permanency of Claimant's condition was at issue. To avoid the time bar, application for Section 8(f) relief must be filed with the District Director as soon as permanency of the Claimant's condition becomes known or is at issue. The Regional Solicitor further contends that since an application for Section 8(f) relief was filed on June 22, 2005, and no extension of time was requested, Employer's application is untimely and Employer is barred from Special Fund relief.

In response, Employer contends that because at informal conference Claimant sought temporary total disability, Employer was not under an obligation to seek Section 8(f) relief. Therefore, the time bar was therefore not applicable in this instance.

Section 8(f) of the Act provides in pertinent part:

> (3) Any request . . . for apportionment of liability to the special fund . . . shall be presented to the deputy commissioner prior to the consideration of the claim by the deputy commissioner. Failure to present such request prior to such consideration shall be an absolute defense to the special fund's liability . . . **unless the employer could not have reasonably anticipated the liability of the special fund prior to the issuance of a compensation order.**

33 U.S.C. § 908(f)(3).

Procedures for determining applicability of section 8(f) of the Act, 20 C.F.R. § 702.321(b)(3), provides:

> Where the claimant's condition has not reached maximum medical improvement and no claim for permanency is raised by the date the case is referred to the OALJ, an application need not be submitted to the district director to preserve the employer's right to later

> seek relief under section 8(f) of the Act . . . The absolute defense will not be raised where permanency was not an issue before the district director . . . The failure of an employer to present a timely and fully documented application for section 8(f) relief may be excused only where the employer could not have reasonably anticipated the liability of the special fund prior to the consideration of the claim by the district director.

20 C.F.R. § 702.321(b)(3).

Since Section 8(f) of the Act limits Employer's liability to 104 weeks, Employer may reasonably anticipate liability of the special fund only where the liability is expected to exceed 104 weeks.

The memorandum of informal conference listed issues of: (1) nature and extent of disability; (2) TTD (1/27/04 and continuing); (3) PPD (5% PPI to each hand); (4) ability to return to work; (5) medical (referral); (6) attorney fee. Thus, arguably, permanency was an issue only in regard to the five percent disability to each of Claimant's hands.

At informal conference, Employer agreed to "authorize visit to Dr. Aldridge," a pain management specialist, thereby giving rise to an assumption that MMI of work-related injuries other than Claimant's hands had not been reached. Therefore, MMI was apparently not at issue at the time of the informal conference and was not addressed therein.

The statutory number of weeks of liability for both hands was 12.2 weeks, a pro-rated amount of the 244 total weeks provided for the scheduled impairment. Employer paid this amount in full directly after the informal conference. This maximum of 12.2 weeks being far less than the threshold of 104 weeks of liability needed to implicate liability of the second injury fund, Employer could not have reasonably foreseen second injury fund liability based on the 5% permanent disability to both of Claimant's hands.

Since Employer could not have reasonably foreseen second injury fund liability at the time of informal conference, I find and conclude that the Regional Solicitor is precluded from raising the absolute defense on these grounds.

Forms 207 filed June 17, 2002 through November 26, 2003, prior to the informal hearing bore the notation "8f," and some listed "nature and extent." Forms 203 filed May 12, 2003, and November 17, 2003, listed permanent disability under question 32. As these notations were not addressed at informal conference and conceivably could originally have referred to the scheduled injury to Claimant's hand, I find that this evidence does not establish that permanency was at issue prior to or immediately after the informal conference. Accordingly, I find that because Employer could not have reasonably anticipated the liability of the special fund prior to the consideration of the claim by the district director, the Regional Solicitor is precluded from raising the absolute defense against Employer in this proceeding.

Based on the foregoing, I find and conclude that Employer is not precluded from recovery by the absolute bar, established the three pre-requisites necessary for entitlement to Section 8(f) relief under the Act, and is therefore eligible to receive Section 8(f) relief.

VI. SCHEDULED PAYMENT

The parties have stipulated to Employer's liability for statutory compensation for 5% scheduled disability to both of Claimant's hands. Employer contends that it paid the scheduled payment for both hands based on an average weekly wage of $642.00. Claimant credibly testified he had received the scheduled payment for only one hand. The parties have now stipulated to average weekly wage of $652.40.

Claimant has submitted into evidence a copy of Employer's check number 549741 in the amount of $6,786.86, which Claimant submits includes the scheduled payment for one hand. Employer submitted a copy of Form LS-208 in which it states a payment of $10,443.20, but has not submitted other evidence verifying payment to Claimant. As the record is devoid of indicia of payment by Employer for the $10,443.20, Employer is found to have paid to Claimant only $5,221.60 (244 weeks x 5% = 12.2 weeks x $428.00 [$642.00 x 2/3]), the scheduled payment for one hand based on AWW of $642.00.

I find that Employer is liable for the scheduled payment for 5% disability to both of Claimant's hands based on an average weekly wage of $652.40, less credit for prior payment of $5,221.60.

VII. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984).

Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This order incorporates by reference this statute and provides for its specific administrative application by the District Director.

VIII. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.[3] A

[3] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981),

service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

IX. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer's Application for Section 8(f) relief is hereby **GRANTED.**

2. Employer shall pay Claimant compensation for temporary total disability from May 17, 2002 to July 7, 2002, and from July 15, 2002 to August 20, 2003, based on Claimant's average weekly wage of $652.40, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

3. Employer shall pay Claimant compensation for permanent total disability from August 21, 2003, continuing for a period of 104 weeks, based on Claimant's average weekly wage of $652.40, in accordance with the provisions of Section 8(a) of the Act. 33 U.S.C. § 908(a).

4. Employer shall pay Claimant scheduled compensation for permanent partial disability of 5% to both of Claimant's hands based on his average weekly wage of $652.40, less credit for prior payment of $5,221.60, in accordance with the provisions of Section 8(c) of the Act. 33 U.S.C. § 908(c)(3).

5. Employer shall pay to Claimant the annual compensation benefits increase pursuant to Section 10(f) of the Act effective October 1, 2003, for the applicable period of permanent total disability.

6. Employer shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's May 17, 2002, work injury, consistent with this Decision and Order including urological and sleep apnea conditions, pursuant to the provisions of Section 7 of the Act.

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aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **March 28, 2005,** the date this matter was referred from the District Director.

7. Employer shall receive credit for all compensation heretofore paid, as and when paid.

8. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

9. Claimant's attorney shall have thirty (30) days from the date of service of this decision by the District Director to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 8th day of February, 2007, at Covington, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge